IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

PRESENT:-
Mr. Justice Naimatullah Phulpoto
Mr. Justice Shamsuddin Abbasi

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Criminal Appeal No.D-125 of 2021

Appellants	Qadir Bux @ Dado and six others through M/s Muhammad Yousuf Leghari and Muhammad Hashim Leghari, Advocates.
Respondent	The State through Mr. Shewak Rathore, D.P.G.
Date of hearing	27.01.2022
Date of detailed reasons	16.02.2022

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JUDGMENT

SHAMSUDDIN ABBASI, J. Qadir Bux @ Dado, Abid Ahmed, Asif Ali, Shahid Ali, Sajid Ali, Waqar Ahmed and Muharram Ali, appellants, were tried by learned Anti-Terrorism Court, Shaheed Benazirabad, in Special Case No.12 of 2021, arising out of FIR No.32 of 2021 registered with Police Station Airport, District Shaheed Benazirabad, for offences punishable under Sections 324, 353, 364, 427, 337-L(ii), 148, 149, PPC read with Section 7 of Anti-Terrorism Act, 1997 and under Section 4(b), 5 of Explosive Substances Act, 1908, and Special Cases No.13, 14, 15, 16, 17, 18 and 19 of 2021, arising out of FIRs No.33, 34, 35, 36, 37, 38 and 39 of 2021 registered with Police Station Airport, Shaheed Benazirabad, for offences punishable under Section 23(1)(a), 25(a) of Sindh Arms Act, 2013 read with Section 7 of Anti-Terrorism Act, 1997. Through common judgment dated 13.10.2021 they were convicted and sentenced as follows:-

(i) *"Accused Qadir Bux alias Dado Lakho, Abid Ahmed Lakho, Asif Ali Lakho, Shahid Ali Lakho, Sajid Ali Lakho, Waqar Ahmed Bhatti and Muharram Ali Mallah are convicted for offence U/S 324 PPC and awarded rigorous imprisonment to undergo for ten years with fine of Rs.50,000/- each and in case of failure to pay fine amount, they shall serve six months more as simple imprisonment.*

(ii) *They are also convicted for offence U/S 353 PPC and awarded punishment for two years with fine amount of Rs.20,000/- each.*

(iii) They are also convicted for offence U/S 364, PPC and awarded punishment for ten years with fine amount of Rs.50,000/- each and in case of failure to pay fine amount, they shall undergo for six months more as simple imprisonment.

(iv) They are also convicted for offence U/S 427 PPC and awarded punishment for two years and fine of Rs.20,000/- each and in case of failure to pay fine amount, they shall undergo for six months more as simple imprisonment.

(v) They are convicted for offence U/S 337-L(ii) PPC and awarded punishment for two years and with fine amount of Rs.20,000/- each.

(vi) They are also convicted for offence U/S 148 PPC and awarded punishment for three years and with fine amount of Rs.20,000/- each and in case of failure to pay the fine amount, they shall undergo for six months more as simple imprisonment.

(vii) They are also convicted for offence U/S 149 PPC and awarded punishment for five years imprisonment.

(viii) They are further convicted for offence U/S 6 & 7 of Anti-Terrorism Act-2013 and awarded punishment for fourteen years imprisonment.

(ix) Accused Qadir Bux alias Dado Lakho is also convicted for offence U/S 4(b) & 5 of the Explosive Substance Act, 1908 and awarded punishment for ten years imprisonment and for offence U/S 23(i)(a) of Sindh Arms Act-2013 and awarded punishment for ten years imprisonment.

(x) Accused Abid Ahmed Lakho is also convicted for offence U/S 4(b) & 5 of the Explosive Substance Act, 1908 and awarded punishment for ten years imprisonment and for offence U/S 23(i)(a) of Sindh Arms Act-2013 and awarded punishment for ten years imprisonment.

(xi) Accused Asif Ali Lakho is also convicted for offence U/S 4(b), 5 of the Explosive Substance Act, 1908 and awarded punishment for ten years imprisonment and for offence U/S 23(i)(a) of Sindh Arms Act-2013 and awarded punishment for ten years imprisonment.

(xii) Accused Shahid Ali Lakho is also convicted for offence U/S 23(i)(a) of Sindh Arms Act-2013 and awarded punishment for ten years imprisonment.

(xiii) Accused Sajid Ali Lakho is also convicted for offence U/S 23(i)(a) of Sindh Arms Act-2013 and awarded punishment for ten years imprisonment.

(xiv) Accused Waqar Ahmed Bhatti is also convicted for offence U/S 23(i)(a) of Sindh Arms Act-2013 and awarded punishment for ten years imprisonment.

(xv) Accused Muharram Ali Mallah is also convicted for offence U/S 23(i)(a) of Sindh Arms Act-2013 and awarded punishment for ten years imprisonment.

All the sentences were ordered to run concurrently and appellants were extended benefit in terms of Section 382-B, Cr.P.C.

2. Short but relevant facts of the case are that on 22.04.2021 the police party of P.S. Airport, headed by Inspector Asghar Ali Awan, was on patrol duty in the area. During patrolling when they reached at VIP road, the Incharge of the party received spy information that some suspects, duly armed with deadly weapons, are present under the shadow of trees near Airport in suspicious condition. They immediately went to the pointed place and reached there at about 0030 hours and saw seven persons in the light of torches, who on seeing police started firing on them, overpowered PC Faheem Hyder Unar, took him with them alongwith his official weapon and extended threats to police party to go back otherwise they would kill PC Faheem. The police took their positions and returned the fires in self defence and called further force through wireless. Meanwhile, SIP/SHO Rasheed Ahmed Memon of P.S. "A" Section Nawabshah and SIP/SHO Ali Mardan Lund of P.S. "B" Section Nawabshah arrived alongwith their respective staff to help them. Thereafter, they all cordoned the culprits and asked them to surrender alongwith weapons. The culprits when noticed that they have been encircled by police, they thrown their weapons and surrendered themselves. Police arrested them and seized the weapons. They also recovered PC Faheem from a room of cattle pond of Qadir Bux @ Dado near his house whose uniform was torn. He disclosed that culprits robbed his official SMG, maltreated him and confined in a room. The police noticed a bullet mark on Jhangla of police mobile, which was damaged due to hitting a fire. The culprits, on inquiry disclosed their names as Qadir Bux @ Dado son of Haji Allah Bux Lakho, Abid Ali son of Haji Allah Bux Lakho, Asif Ali son of Haji Allah Bux Lakho, Shahid Ali son of Haji Allah Bux Lakho, Sajid Ali son of Haji Allah Bux Lakho, Waqar Ahmed son of Muhammad Ramzan Bhatti and Muharram son of Muhammad Bux Mallah. One 30 bore pistol (Pakistan made) with empty magazine, one hand grenade and cash of Rs.1000/- were recovered from Qadir Bux, one Kalashnikov with empty magazine and cash of Rs.2000/- from Abid Ali, one pistol of 30 bore with empty magazine and

cash of Rs.2500/- from Asif Ali, one pistol of 30 with empty magazine and cash of Rs.2500/- from Shahid Ali, one pistol of 30 bore with empty magazine and cash of Rs.2000/- from Sajid Ali, one repeater in working condition and cash of Rs.3000/- from Waqar Ahmed and one repeater in working condition and cash of Rs.1500/- from Muharram. The police called Bomb Disposal Squad, who checked the recovered hand grenades and defused the same. The accused failed to produce valid licenses of recovered weapons, which were sealed at spot alongwith official SMG of PC Faheem in light of torch. After completing usual formalities the accused and recovered property were brought at P.S. where Inspector Asghar Ali Awan lodged FIR against accused persons under Sections 395, 364, 324, 353, 337-L(ii), 148, 149, PPC read with Section 6/7 of Anti-Terrorism Act, 1997 and Section 4B & 5 of Explosive Substances Act, 1908 on behalf of the State while separate cases under Section 23(a) and 25(a) of Sindh Arms Act, 2013 were also registered against each accused for recovery of unlicensed arms and ammunitions.

3. Pursuant to the registration of FIR, the investigation was followed and in due course the challan was submitted before the Court of competent jurisdiction under the above referred Sections, whereby the appellants were sent up to face the trial.

The joint trial was ordered in terms of Section 21-M of Anti-Terrorism Act, 1997.

4. A charge in respect of offences punishable under Sections 324, 353,364, 395, 427, 337-L(ii), 148, 149, PPC read with Section 6/7 of Anti-Terrorism Act, 1997 and Section 23, 23(a), 25(a) of Sindh Arms Act, 2013 and Section 4(b) and 5 of Explosive Substances Act, 1908, was framed against appellants, to which they pleaded not guilty to the charged offence and claimed trial.

5. At trial, the prosecution has examined as many as seven witnesses.

6. Inspector Asghar Ali (complainant) appeared as witness No.1 Ex.5, PC Faheem Hyder at Ex.6, SIP Muhammad Javed Iqbal at Ex.7, PC Feroze Ali at Ex.8, Dr. Muhammad Yaqoob at Ex.10, SIP Syed Abbas Ali at Ex.11

and Inspector Ghulam Shabbir (investigating officer) at Ex.12. All the P.Ws were subjected to cross-examination by the defence. Thereafter, the prosecution closed its side vide statement Ex.13.

7. Appellants Qadir Bux @ Dada, Abid Ahmed, Asif Ali, Shahid Ali, Sajid Ali, Waqar Ahmed and Muharram Ali were examined under Section 342, Cr.P.C. at Ex.14, Ex.15, Ex.16, Ex.17, Ex.18, Ex.19 and Ex.20 respectively, wherein they have denied the allegations imputed upon them by the prosecution, professed their innocence and stated their false implication due to political rivalry. All of them opted not to make a statement on Oath under Section 340(2), Cr.P.C. nor produce any witness in their defence.

8. The trial culminated in conviction and sentence of the appellants as stated in para-1 {supra}, hence necessitated the filing of the listed appeal.

9. It is contended on behalf of the appellants that they are innocent and have been falsely roped in this case by the police on account of political rivalry; that the occurrence had taken place near Airport but no private witness was associated to witness the arrest and recovery proceedings, thus the alleged recovery was in violation of Section 103, Cr.P.C. that nothing incriminating has been recovered from the possession of appellants and the alleged recoveries have been foisted upon them. There is unexplained delay of about fifteen days in sending the case property to FSL, thus the positive report of Forensic Division would not improve the prosecution case that the occurrence had taken place at 3:00 am and the FIR was lodged at 5:15 am after the delay of about two hours and fifteen minutes and that too without furnishing any plausible explanation, hence possibility of false implication of appellants with malafide intention could not be ruled out. The encounter continued for about 30 minutes but none from either side sustained any injury. The learned trial Court based conviction solely on the testimony of police officials without support of independent corroboration. The medical evidence was not in line with the ocular account. The material available on record does not justify the conviction and sentence awarded to the appellants and the same is not sustainable in the eyes of the law. The statements of the prosecution witnesses are full of discrepancies and contradictions made therein are fatal

to the case of the prosecution. The prosecution has failed to discharge its legal obligation of proving the guilt of the appellants as per settled law and the appellants were not liable to prove their innocence. The impugned judgment is bad in law and facts and based on assumptions and presumptions without giving valid and strong findings. The witnesses being subordinate to the complainant have falsely deposed against the appellants. They were inconsistent with each other rather contradicted on crucial points benefit whereof must go to the appellants. The learned trial Court while passing the impugned judgment has deviated from the settled principle of law that a slightest doubt is sufficient for extending benefit of doubt to an accused. The investigating officer had conducted dishonest investigation and involved the appellants in a case with which they had no nexus. The learned trial Court did not appreciate the evidence in line with the applicable law and surrounding circumstances and based its findings on misreading and non-reading of evidence and arrived at a wrong conclusion in convicting the appellants merely on assumptions and presumptions. The impugned judgment is devoid of reasoning without specifying the incriminating evidence against each appellant. The learned trial Court totally ignored the plea taken by the appellants in their defence. Per learned counsel, the appellants have not committed any offence and in their Section 342, Cr.P.C. statements too they have denied the whole allegations leveled against them by the prosecution. The learned trial Court did not consider the pleas taken by the appellants in their Section 342, Cr.P.C. and recorded conviction ignoring the neutral appreciation of whole evidence. The material available on record does not justify the conviction and sentence awarded to the appellants and the same is not sustainable in the eyes of the law. The learned counsel while summing up his submissions has emphasized that the impugned judgment is the result of misreading and non-reading of evidence and without application of a judicial mind, hence the same is bad in law and facts and the convictions and sentences awarded to the appellants, based on such findings, are not sustainable in law and liable to be set-aside and the appellants deserve to be acquitted from the charge and prayed accordingly.

10. The learned APG for the while controverting the submissions of learned counsel for the appellants has submitted that the FIR has been lodged with sufficient promptitude nominating the appellants with specific

role in the commission of offence; that the witnesses while appearing before the learned trial Court remained consistent on each and every material point; that they were subjected to lengthy cross-examination but nothing adverse to the prosecution story has been extracted which can provide any help to the appellants and the minor discrepancies in the light of direct evidence coupled with circumstantial evidence have no value in the eye of law and the same can be ignored; that mere fact that the witnesses belong to police is not sufficient to discard their evidence; that the role of the appellants is borne out from the evidence adduced by the prosecution; that the recoveries have also been proved through reliable evidence adduced by the recovery witnesses; that the prosecution in support of its case has produced oral evidence duly supported by the circumstantial evidence, which was rightly relied upon by learned trial Court; that the findings recorded by the learned trial Court in the impugned judgment are based on fair evaluation of evidence and documents brought on record, to which no exception could be taken; that the plea taken by the defence that appellants had no nexus with the occurrence does not carry weight vis-à-vis providing help to the defence. Lastly contended that the prosecution has successfully proved its case against the appellants beyond shadow of any reasonable doubt, thus, the appeal filed by the appellants warrant dismissal and their convictions and sentences recorded by the learned trial Court are liable to be maintained.

11. We have heard the learned counsel for the parties at length, given our anxious consideration to their submissions and have also scanned the evidence and other material available on record carefully with their able assistance.

12. The incident which formed basis of the instant case is shown to have taken place on 22.04.2021. The crime scene is situated near Airport at a distance of 100 paces from the houses. The information about presence of appellants was communicated to police by spy. On reaching the pointed place an encounter had taken place between police and the accused party which continued for about 30 minutes with exchange of fires from both sides. The police overpowered the accused and recovered unlicensed arms and ammunitions. At spot the proceedings were completed in the light of torches. The FIR was lodged by Inspector Asghar Ali. In the FIR, the burden of committing offence has been pointed

towards seven accused persons. Out of seven, five are brothers and two are their servants, who were tried and recorded with a guilty verdict.

13. The ocular account has been furnished by Inspector Asghar Ali (PW.1) who was Incharge of patrolling party and PC Faheem Hyder (PW.2) who was one of the members of the patrolling party. They claimed to be the eye-witnesses of the incident and implicated the appellants in the commission of crime. A bare look to their evidence reveals that they have contradicted each other on crucial points. Complainant in his deposition has stated that on receipt of spy information he alongwith police party reached at the pointed place and saw seven accused person who on seeing police started firing and the police returned the fires in self defence. He further deposed that during firing the accused persons abducted PC Faheem Hyder, who was leading member of police party, within their sight. On the other hand, PW.2 PC Faheem Hyder in his evidence has deposed that as soon as they reached at the place of incident, they raised Hakal and asked accused to surrender; meanwhile two accused came towards him, robbed his official SMG, gave him butt blows, abducted him and confined in a cattle pan. By deposing so, he has improved the prosecution case and negated the story narrated in the FIR as well as in the deposition of complainant, which do not disclosed robbing of official SMG, causing butt blows and raising any Hakal to the accused. The complainant only deposed that he was informed by PC Faheem after his release that accused caused him injuries with butt blows and also robbed his official weapon. According to PC Faheem, the accused caused butt blows at his shoulder, wrist of arm and knees but complainant has stated that PC Faheem was having butt blows on his thigh. According to complainant, PC Faheem Hyder was confined in cattle plan of Qadir Bux, who came back whereas according to PC Faheem he was kept in wrongful confinement for about 30 minutes and got released by SHO Asghar Ali Awan. Both of them were cross-examined by the defence. In his cross-examination, the complainant has admitted that weapons were sealed by him with the help of SHO Javed and other police constables while memo of arrest and recovery was written by Munshi Faheem. He has been contradicted by PC Faheem who stated that memo of arrest and recovery was prepared by SHO Asghar Ali Awan. The complainant has stated that BDS arrived at the scene of offence after 30 minutes but

according to PC Faheem, BDS arrived after one hour of the incident.

14. SIP Muhammad Javed Iqbal, who is one of the mashirs of memo of arrest and recovery, appeared as witness No.3 Ex.7. He deposed that memo of arrest and recovery was prepared by SHO Asghar Ali (complainant) and he acted as mashir. He deposed that hand grenades were recovered from accused Qadir Bux and Asif whereas according to complainant hand grenades were recovered from three accused namely, Qadir Bux, Asif and Abid. The incident has taken place on 22.04.2021 but in his cross-examination he admitted that 21.04.2021 is date mentioned in his Section 161, Cr.P.C. statement as date of incident. It is the case of prosecution and deposed by the complainant that due to firing of accused one bullet hit to police mobile, but in his cross-examination he stated that two bullets hit to the police mobile. He admitted that memo of arrest and recovery was prepared by SHO Asghar Ali. By admitting so, he has contradicted complainant Inspector Asghar Ali, who stated that memo of arrest and recovery was written by Munshi. According to him the weapons were sealed within 15/20 minutes but according to complainant one and half hour was consumed in sealing the weapons. He is also one of the mashirs of memos of inspection of police mobile and site inspection prepared PW.7 Inspector Ghulam Shabbir (investigating officer). According to him during encounter two bullets hit to police mobile but investigating officer has stated there was only one bullet mark on the police mobile. PW.7 Inspector Ghulam Shabbir also noted the injuries suffered by PC Faheem Hyder with butt blows. He deposed that the injuries were on left shoulder, both thighs of legs and backside. As noted above, according to PC Faheem Hyder the accused caused him butt blows at his shoulder, wrist of arm and knees whereas according to complainant PC Faheem was having butt blows on his thigh.

15. The comparison of the statements of complainant and mashir established that they not only contradicted each other, but altogether narrated a different and conflicting story. It is, thus, difficult for a prudent mind to ascertain that who was deposing true facts, when otherwise under the facts and circumstances of the case, the complainant and PC Faheem are the star witnesses of the prosecution and being the central figures, the entire prosecution case revolves upon their testimony, but due to glaring

contradictions and discrepancies, noted above, their testimony cannot termed to be worth credence. Thus, in no way the statements of either of the witnesses is helpful to the prosecution rather caused a big and irreparable dent and damage to the prosecution case.

16. Insofar as to the contention of learned APG that the prosecution has produced police officials to establish the charge, thus their testimony cannot be discarded merely on the basis of minor discrepancies, suffice to observe that it is not necessary that a witness, who is neither related to complainant nor inimical towards the accused, always speaks true, but it is the duty of the Court to scrutinize the statement of such witness with utmost care and caution. Reliance may well be made to the case of *Muhammad Saleem v The State* (2010 SCMR 374), wherein it has been held as under:-

> *"The acid test of veracity of a witness is the inherent merit of his own statement. It is not necessary that an impartial and independent witness, who is neither related to the complainant nor inimical towards the accused would stamp his testimony necessarily to be true. The statement itself has to be scrutinized thoroughly and it is to be seen as to whether in the circumstances of the case the statement is reasonable, probable or plausible and could be relied upon. The principle that a disinterested witness is always to be relied upon even if his statement is unreasonable, improbable and not plausible or not fitting in the circumstances of the case then it would lead to a very dangerous consequence. Reference is invited to Muhammad Rafique v. State 1977 SCMR 457 and Haroon v. State 1995 SCMR 1627. … Applying the test to the prosecution witnesses, we find that their statements do not come within the ambit of above rule of acceptance of evidence, therefore, no implicit reliance can be placed on such type of evidence without any corroboration which is lacking in the present case".*

17. Occurrence alleged to have taken place at 3:00 am and according to the complainant and mashirs they completed all formalities within one and half hours and then returned back to P.S. meaning thereby they become free at 4:30 am. Admittedly, the P.S. was at a distance of one kilometer from place of incident. If this version of the prosecution is taken as true then there was every possibility of reaching P.S. within five to ten minutes i.e. 4:35 or 4:40 am more particularly when they were in police mobile and it was night time and there was no traffic on the road. Undisputedly, the FIR was lodged at 5:15 am viz after two hour and fifteen minutes of the incident and after 40 of their reaching at P.S. The prosecution has not

been able to furnish any explanation with regard to delay in lodging of FIR. Hence, presumption would be drawn that FIR had been lodged after due deliberations and consultations. It is a well settled principle of law that FIR is always treated as a cornerstone of the prosecution case to establish guilt against those involved in a crime, thus it has a significant role to play, hence if there is any delay in lodging of FIR and commencement of investigation, it gives rise to a doubt and benefit thereof is to be extended to the accused. Reliance may well be made to the case of *Zeeshan @ Shani v/s The State* {2012 SCMR 428}, wherein it has been held by Hon'ble apex Court that delay of more than an hour in lodging of FIR give rise to an inference that occurrence did not take place in the manner projected by the prosecution and time was consumed in making efforts to give a coherent attire to prosecution case, which hardly proved successful.

18. A keen look of the record reveals that accused were equipped with sophisticated weapons and made continuous firing on the police and police also made counter firing in self defence. The record is suggestive of the fact that encounter continued for about 30 minutes. The police party was consisting of six members including head of the party and the accused were seven in number, but astonishingly neither anyone from police has sustained any bullet nor any bullet hit to any of the accused. It is, indeed, something beyond comprehension that only police mobile was hit with a bullet and none from either side did receive a single injury or scratch despite of the fact that they were in the close proximity. The FIR shows that seven persons opened firing on the police the moment they were encircled, without any indication that either the police first got down from the mobile and then made counter firing or made fires on the accused straight from the police mobile. A bare perusal of memo of site inspection (Ex.7/E) reveals that during site inspection the investigating officer seized and secured 79 empty shells of different arms fired from both side. It does not appeal to a prudent mind that when there was simultaneous firing by seven accused and in reply thereof the police personnel, who were six in number, also made counter firing with a close proximity no bullet hit to anyone except the police mobile. The prosecution though established that the police mobile was damaged due to fire projectile, but failed to prove that such damage was actually caused due to firing of the accused. Even the witnesses have not uttered a single word as to how

many fires were shot by accused and police personnel and that from whose firing the police mobile was damaged. It is also the case of prosecution that appellants, who were seven in number, were armed with sophisticated weapons and it is unbelievable that they without causing any harm to police were arrested at spot. Thus, the story set-forth in the FIR seems to be self-made and unsafe to rely upon.

19. Adverting to the recovery of unlicensed arms and ammunitions from the possession of appellants, suffice to observe that incident had taken place near a patrol pump at Lakha Chowk, which is a busy chowk, surrounded by residential houses at a distance of 100 paces. The record is also suggestive of the fact that there was exchange of firing from both sides, therefore, the possibility of inhabitants of the nearby houses cannot be ruled out. It is also noteworthy that complainant had prior information about the presence of accused at the place of incident, but he did not bother to associate an independent source to strengthen prosecution case by collecting any independent evidence. The fact of availability of houses near the place of incident has also been admitted by the witnesses in their respective evidence. Thus, to that extent the contention of the counsel for the appellants remains firmed. The manner of arrest and recovery as narrated through evidence recorded by the police officials has lost its sanctity. We are also conscious of the fact that there should some plausible explanation that actually attempts were made to associate an independent witness from the locality, when otherwise under the circumstances of the present case the appellants have pleaded their false implication and even denied their arrest from the place of occurrence or at the time as shown by the prosecution, hence association of an independent witness was necessary to attest the arrest and recovery proceedings, but admittedly no such efforts were made either by the complainant when he had a prior information or by the investigating officer while conducting site inspection. Admittedly, the mashirs of recovery and site inspection are police officials. No explanation has been furnished by the prosecution for non-associating a private witness except that it was night time and private persons were not present there, which is not a valid excuse. The facts and circumstances of the case disclosed that there had been sufficient opportunity to the prosecution to join an independent person to witness the arrest, recovery and securing of

empties, but no attempt was even made in this respect. The Hon'ble Supreme Court in the case of *Tayyab Hussain Shah v The State* (2000 SCMR 683) held as under:-

> *"The plea of the accused was that the gun had been planted on him and this fake recovery was proved by the police witnesses namely, the Investigating Officer alongwith the Foot Constable. The plea is that the said recovery is of no evidentiary value as the same was made in violation of requirements of section 103, Cr.P.C. In the case of State through Advocate General, Sindh v. Bashir and others (PLD 1997 SC 408) Ajmal Mian, J., as he then was, later Chief Justice of Pakistan, observed that requirements of section 103, 'Cr.P.C. namely that the two members of the public of the locality should be Mashirs to the recovery, is mandatory unless it is shown E by the prosecution that in the circumstances of a particular case it was not possible to have two Mashirs from the public. If, however, the statement of the police officer indicated that no effort was made by him to secure two Mashirs from public, the recoveries would be doubtful. In the instant case, from the statement of the Investigating Officer it is apparent that no efforts were made to join any member of the public to witness the said recovery. In F the overall circumstances of the case, we do not find it safe to rely on the said recovery. Once recovery of gun is considered doubtful the report of the fire-arm expert that the empty statedly recovered from the spot matched with the gun loses its significance".*

20. No doubt applicability of Section 103, Cr.P.C. is ousted as is embodied under Section 34, Sindh Arms Act, 2013, and the police witnesses are good witnesses as that of any other person from the public but when the police witness was going to charge a person for an offence which carries punishment in shape of detention then it was incumbent upon the police to associate independent persons to witness the arrest and recovery proceedings. Furthermore there are separate FIRs for alleged recovery of arms and ammunitions from the possession of seven accused, but there was a joint Mushirnama in respect of the arrest and recovery of seven accused, which is not inadmissible and has no legal value in the eyes of law. It is settled principle of law that every accused would be presumed to be innocent and may not be termed as criminal unless found guilty of charge by the competent Court of law after safe trial. The recoveries, thus, are fatal to the case of the prosecution.

21. As to positive report of Forensic Division (Ex.12/E) produced by PW.7 Inspector Ghulam Shabbir (investigating officer) is concerned, suffice it to say that weapons and crime empties alleged to have been

recovered on 22.04.2021 were sent to the office of Forensic Division, Hyderabad, on 07.05.2021 i.e. after 15 days of recovery and that too without furnishing any plausible or justifiable reasoning or explanation. In such background of the matter, serious question arises with regard to safe and secure custody of the case property from the date of recovery till the date of its dispatch to the offices of Forensic Division. At this juncture, it would be appropriate to highlight the evidence adduced by PW.7 Inspector Ghulam Shabbir (investigating officer), who categorically stated that he sent the weapons for FSL examination on 07.05.2021`through PC Feroze. He further admitted that three hand grenades recovered from the possession of three appellants were not sent to the office of Forensic Division for examination and report. He also admitted that FSL report (Ex.12/E) does not contain any description and opinion of the recovered hand grenades. The prosecution has failed to place on record any inspiring evidence showing that soon after the recovery of crime weapons and empties the same were dispatched to the concerned office for examination and report. In view of this background of the matter, two interpretations are possible, one that the case property had not been tampered and the other that the same was not in safe hand and had been tampered. It is settled law that when two interpretations of evidence are possible, the one favouring the accused shall be taken into consideration. Thus, the positive report qua the crime weapons and empties being delayed without furnishing any plausible explanation, would not advance the prosecution case, therefore, has wrongly been relied upon by the learned trial Court. The prosecution has failed to substantiate the point of safe custody of case property and its safe transit to the expert through cogent and reliable evidence and the alleged recovery of crime weapons, on the face of it, seems to be doubtful in view of the dictum laid by the Hon'ble apex Court in the case of *Ikramullah & others v The State* {2015 SCMR 1002}, wherein it has been held as under:-

> *"In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admitted no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being*

> *deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substances had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit".*

22. The contention of learned APG that crime empties secured from the place of incident were matched with the weapons recovered from the possession of appellants, which fully established the involvement of the appellants in the commission of offence, suffice it to say that in view of what has been discussed above, the report of Forensic Division has lost its sanctity and unsafe to rely upon. Furthermore, it is by now well-settled that the recovery of fire-arms and empties etc. are always considered to be corroborative piece of evidence and such kind of evidence by itself is not sufficient to bring home the charges against the accused especially when the other material put-forward by the prosecution in respect of guilt of the appellants has been disbelieved. Reference may well be made to the case of *Imran Ashraf and 7 others v The State* (2001 SCMR 424), wherein it has been held as under:-

> *"Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and recoveries, therefore, are to be considered simultaneously in order to reach for a just conclusion."*

23. The another intriguing aspect of the matter is that the prosecution has not exhibited the case property in evidence as 'articles'. The learned trial Court while recording the statements of prosecution witnesses has neither specifically mentioned the each case property nor given particulars of the case property produced by the prosecution at trial. A careful examination of the prosecution witnesses shows that the witnesses have simply identified the case property as same and did not specifically describe which property was recovered from which accused and also failed to give full account of the case property in their respective evidence. Even otherwise, the same has not been shown to the appellants at the time of recording their Section 342, Cr.P.C. statements. It is by now a settled principle of Criminal Law that each and every material piece of evidence being relied upon by the prosecution against an accused must be

put to him at the time of recording of his statement under Section 342, Cr.P.C. so as to provide him an opportunity to explain his position in that regard and denial of such opportunity to the accused defeats the ends of justice. It is also equally settled that a failure to comply with this mandatory requirement vitiates a trial. We have truly been shocked by the cursory and casual manner in which the learned trial Court had handled the matter of production of case property at trial and recording of the appellants' statements under Section 342, Cr.P.C. which statements are completely shorn of the necessary details which were required to put to the appellants. It goes without saying that the omission on the part of the learned trial Court, noted above, was not merely an irregularity but had vitiated the appellants' conviction more particularly when the evidence of police officials adduced by the prosecution in respect of guilt of the appellants has been disbelieved. Reliance may well be made to the case of *Dr. Israr-ul-Haq v. Muhammad Fayyaz and another* (2007 SCMR 1427), wherein the relevant citation (c) enunciates:-

> *"Direct evidence having failed, corroborative evidence was of no help. When ocular evidence is disbelieved in a criminal case then the recovery of an incriminating article in the nature of weapon of offence does not by itself prove the prosecution case.*

24. From review of record, we have also observed that prosecution has also failed to produce the alleged torches through which the complainant and eye-witness alleged to have seen the accused and in their lights all proceedings were completed at spot. The prosecution has claimed that at the time of incident each member of the police party was carrying torch and all proceedings were completed at spot in the light of torches including memo of arrest and recovery, but the said torches have neither been taken into custody nor produced in Court at trial. The omission to prove presence of torches at spot is of immense importance when seen in the context that the incident occurred at night time at 3:00 am and there was dark. Failure to prove source of torch in a night time occurrence is always considered dent in prosecution case. It is also the case of the prosecution that PC Faheem Hyder was kidnapped by the accused persons, maltreated with butt blows causing injuries on his body and his police shirt was also torn. In this context, PW.7 Inspector Ghulam Shabbir (investigating officer) has admitted in his cross-examination that during

investigation that he secured the torn shirt of PC Faheem, but the same was not produced at trial either by PC Faheem or by the investigating officer. The omission, thus, rendered the case of the prosecution extremely doubtful. Even otherwise, the medical evidence is not in line with the ocular account furnished by the prosecution witnesses. According to PC Faheem he sustained injuries at his shoulder, wrist of arm and knees whereas according to Inspector Asghar Ali (complainant) the injuries were on his thigh. Surprising to note that narration of facts by the complainant and eye-witness is not in line with the injuries ascribed by Medical Officer, PW.6 Dr. Muhammad Yaqoob, on the person of PC Faheem Hyder. PW.6 observed two injuries (i) brouse on anterior aspect of right forearm 03 x 02 cm and (ii) brouse on dorsum of right hand 02 x 02 cm. Thus, the ocular account furnished by the prosecution has been belied by the medical evidence.

25. There is no denial of the fact that out of seven appellants, five are brothers and two are their servants. This position strengthened the defence plea taken by the appellants in their Section 342, Cr.P.C. they have been falsely roped in this case owing to political rivalry.

26. We, while sitting in appeal, are under heavy obligation to assess by thinking and rethinking, lest an innocent person fall a prey to our ignorance of facts and ignorance of law. The Court must not close its eyes to human conducts and behaviours while deciding criminal cases, failing which the results will be drastic and impacts will be far from repair. The cardinal principle of justice always laid emphasis on the quality of evidence which must be of first degree and sufficient enough to dispel the apprehension of the Court with regard to the implication of innocent persons along with guilty one by the prosecution, otherwise, the golden principle of justice would come into play that even a single doubt if found reasonable would be sufficient to acquit the accused, giving him/them benefit of doubt because bundle of doubts are not required to extend the legal benefit to the accused. In this regard, reliance is placed on a view held by the Hon'ble Supreme Court in the case of *Riaz Masih alias Mithoo v The State* {1995 SCMR 1730} and *Sardar Ali v Hameedullah and others* {2019 P.Cr.LJ 186}. Likewise, it is a well settled principle of law that involvement of an accused in heinous nature of offence is not sufficient to

convict him as the accused continues with presumption of innocence until found guilty at the end of the trial, for which the prosecution is bound to establish its case against the accused beyond shadow of any reasonable doubt by producing confidence inspiring and trustworthy evidence. It is a cardinal principle of administration of justice that in criminal cases the burden to prove its case rests entirely on the prosecution. The prosecution is duty bound to prove the case against accused beyond reasonable doubt and this duty does not change or vary in the case in which no defence plea is either taken or established by the accused and no benefit would occur to the prosecution on that account and its duty to prove its case beyond reasonable doubt would not diminish. The prosecution has not been able to bring on record any convincing evidence against appellants to establish their involvement in the commission of offence charged with beyond shadow of reasonable doubt. Rather, there are so many circumstances, discussed above creating doubts in the prosecution case and according to golden principle of benefit of doubt one substantial doubt would be enough for acquittal of the accused. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim "it is better that ten guilty persons be acquitted rather than one innocent person be convicted" which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the ***Holy Prophet (PBUH)*** that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent". Accordingly, I am of the humble view that the prosecution has failed to prove the guilt of the appellants. The convictions and sentences awarded to the appellants through impugned judgment dated 13.10.2021, are without appreciating the evidence in its true perspective, rather the same is packed with various discrepancies and irregularities, which resulted into a benefit of doubt to be extended in favour of the appellants.

27. Foregoing are the reasons for our short order dated 27.01.2022, whereby this Criminal Appeal No. D-125 of 2021 was allowed, impugned judgment was set-aside and the appellants were acquitted of the charge. Short order is reproduced as under:-

"Heard arguments. For the reasons to be recorded later on, instant appeal is allowed and judgment dated 13.10.2021 passed by learned Judge Anti-Terrorism Court, Shaheed Benazirabad is set aside. Resultantly, appellants / accused Qadir Bux alias Dado, Abid Ahmed, Asif Ali, Shahid Ali, Sajid Ali, Waqar Ahmed Bhatti and Muharram Ali Mallah are acquitted of the charges in main case bearing Crime No.32 of 2021 of P.S Airport under Sections 324, 353, 364, 427, 337-L(ii), 148, 149 PPC r/w Section 6/7 of Anti-Terrorism Act, 1997, 4(b), 5 Explosive Substance Act. Appellant / accused Qadir Bux alias Dado S/o Haji Allah Bux Lakho is acquitted of the charge in Crime No.33 of 2021 of P.S Airport under Sections 23(a), 25(a) of Sindh Arms Act, 2013, 4(b), 5 Explosive Substance Act. Appellant / accused Abid Ahmed S/o Haji Allah Bux Lakho is acquitted of the charge in Crime No.34 of 2021 of P.S Airport under Sections 23(a), 25(a) of Sindh Arms Act, 2013, 4(b), 5 Explosive Substance Act. Appellant / accused Asif Ali S/o Haji Allah Bux Lakho is acquitted of the charge in Crime No.35 of 2021 of P.S Airport under Sections 23(a), 25(a) of Sindh Arms Act, 2013, 4(b), 5 Explosive Substance Act. Appellant / accused Shahid Ali S/o Haji Allah Bux Lakho is acquitted of the charge in Crime No.36 of 2021 of P.S Airport under Sections 23(a), 25(a) of Sindh Arms Act, 2013 r/w Section 6/7 of Anti-Terrorism Act, 1997. Appellant / accused Sajid Ali S/o Haji Allah Bux Lakho is acquitted of the charge in Crime No.37 of 2021 of P.S Airport under Sections 23(a), 25(a) of Sindh Arms Act, 2013 r/w Section 6/7 of Anti-Terrorism Act, 1997. Appellant / accused Waqar Ahmed S/o Muhammad Ramzan Bhatti is acquitted of the charge in Crime No.38 of 2021 of P.S Airport under Sections 23(a), 25(a) of Sindh Arms Act, 2013 r/w Section 6/7 of Anti-Terrorism Act, 1997 and Appellant / accused Muharram Ali S/o Muhammad Bux Mallah is acquitted of the charge in Crime No.39 of 2021 of P.S Airport under Sections 23(a), 25(a) of Sindh Arms Act, 2013 r/w Section 6/7 of Anti-Terrorism Act, 1997. All the appellants / accused shall be released forthwith if not required to be detained in some other custody case.

JUDGE

JUDGE